Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHARLES PETTUS,

Petitioner,

v.

I.T.O. CORPORATION OF VIRGINIA and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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82pp

QUESTIONS PRESENTED

Is a written claim for "any and all compensation benefits which may be due" sufficient to constitute a request for modification of a compensation award under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 922?

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Decision of Administrative Law Judge Richard K. Malamphy, dated January 29, 1992: Pettus v. I.T.O. Corporation of Virginia, ALJ Nos. 91-LHC-1261; 91-LHC-1262 (1992).

STATEMENT OF JURISDICTION

The immediate case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The District Director of the Fifth Compensation District, U.S. Department of Labor, had the authority to enter awards with respect to the initial compensation claims in this matter pursuant to Section 919(c) of the LHWCA. The Administrative Law Judge of the U.S. Department of Labor had jurisdiction to hear the subsequent LHWCA Section 922 claim in the matter, and the Benefits Review Board had jurisdiction to hear the appeal therefrom, under Sections 919(c) & (d) and Section 921(b)(3) of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal from the Benefits Review Board pursuant to Section 921(c) of the LHWCA. The decision of that court was rendered on January 16, 1996.

This Court has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit by way of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

33 U.S.C. Section 922:

Upon his own initiative, or upon the application of any party in interest, (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the

compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). On September 22, 1987 and February 1, 1988, Petitioner in this matter, Charles Pettus, was injured while working as a longshoreman for Respondent, I.T.O. Corporation of Virginia. Both injuries were to Petitioner's right knee, both resulted in periods of temporary total disability under the Act, and both resulted in a permanent partial disability to that knee. As a result, Petitioner filed claims for both injuries on June 1, 1988, for which compensation awards were entered on August 23, 1989 (App.D. at XLI-XLII; App.E. at XLV). Respondent complied with the orders and made its last payment to Petitioner on August 28, 1989.

On September 6, 1989, counsel for Petitioner submitted a letter to the Office of Workers' Compensation Programs for the U.S. Department of Labor ("OWCP") which referenced the two claims and stated as follows: "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [LHWCA]." The OWCP filed these letters, but otherwise took no

action with regard to Petitioner's case and did not give notice to Respondent of the filing of the letters.

The next month, as a result of his injured knee, Petitioner suffered an additional period of temporary total disability from October 3 to October 17, 1989. As a result, counsel for Petitioner filed a request for modification pursuant to Section 922 of the Act on December 13, 1989. The request was made through a letter of that date to the District Director which referenced the two prior claim numbers and stated: "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]."

On January 10, 1991, counsel for Petitioner made a request for an informal conference on the issue of temporary total disability with respect to the period of disability in October of 1989. That request consisted of a "not fit for duty" slip from a Dr. Morales covering the period of disability and a letter stating:

> Enclosed with this letter please find photostatic copy of a "Not fit for duty" status slip covering the period 10/3/89 to 10/17/89. I would greatly appreciate it if you would please set this matter down

for a conference on the issue of temporary total disability covering the above period.

On February 6, 1991, a conference was held in the matter. As the parties were unable to resolve the issue through the conference, a formal hearing was held before the Honorable Richard K. Malamphy, Administrative Law Judge, on October 8, 1991. Subsequent to that hearing, on January 29, 1992, Judge Malamphy rendered his Decision and Order in the matter denying benefits on the grounds that Claimant's filings were insufficient to constitute requests for modification under Section 922 of the LHWCA. Accordingly, he held that the claim for benefits during the October, 1989 period was time-barred (App.C. at XXXVI-XXXVII).

Claimant requested review before the Benefits Review Board of the U.S. Department of Labor. The Board issued a Decision and Order, dated June 13, 1994, reversing the decision of the Administrative Law Judge and modifying the ALJ's award to reflect Petitioner's entitlement to temporary total disability benefits from October 3 through October 17, 1989. The Board determined that Petitioner's December 13, 1989 correspondence constituted a valid request for modification and that his modification request was

therefore timely under Section 922 of the Act (App.B. at XXIV-XXV).

Respondent requested review before the United States Court of Appeals for the Fourth Circuit. In an Opinion, written by Judge Wilkinson, and joined in by Chief Judge Ervin and Judge Hall, a panel of the Court of Appeals reversed the decision of the Benefits Review Board and remanded the case with directions to deny the claim. In so doing, the Court of Appeals determined that Claimant's various filings were insufficient to constitute requests for modification under Section 922 of the Act and that any claim for the knee-related disability during the October 1989 period was time-barred. In so finding, the Court stated as follows:

> Section 922's requirement that review commence within one year is not automatically fulfilled by just any communication from the claimant. A request for modification constitutes the commencement of review only if it is sufficient to initiate the process required under [Section] 922, a process whose next step must occur within ten days of claimant's request for modification. While a claimant's application for

> modification need not meet any particular form, there must be some basis for a reasonable person to conclude that a modification request has been made.

73 F.3d 523, 527 (App.A. at XI). Further, the Court stated:

> Here, Pettus' letters were too sparse to meet even this most lenient of standards. They made no reference to any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with an earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification. The letters thus failed to indicate any actual intention on the part of the claimant to seek compensation for a particular loss, a factor that is critical in assessing their sufficiency.

Id. (App.A. at XI-XII).

Petitioner now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. ***The decision of the Court of Appeals in this case is in direct conflict with the decisions of the Courts of Appeals in five other federal judicial circuits.***

Section 922 of the LHWCA establishes a mechanism whereby a party, upon the ground of either a change in condition or a mistake in a determination of fact by the deputy commissioner, may seek a new compensation order terminating, continuing, reinstating, increasing, decreasing, or awarding compensation.[2] As a prerequisite to such relief, the party seeking the modification must file a request for the modification within one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of the claim.

The one-year limitation embodied in

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[2] Under this section, the deputy commissioner, now district director pursuant to 20 C.F.R. Section 702.105, has the authority to enter the award sought and, in fact, may do so on his own initiative. Id. Of course, that power is subject to the limitations period prescribed in the statute.

Section 922 is generally regarded as a bar on the power of the district director to modify existing compensation awards. See generally Intercounty Constr. Co. v. Walter, 422 U.S. 1, 44 L.Ed.2d 643 (1975). Nevertheless, the limitation has long-since been construed liberally in keeping with the remedial purposes of the Act and with this Court's mandate that the Act should be liberally interpreted and applied to avoid harsh and incongruous results. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268, 53 L.Ed.2d 320, 335-36 (1977). Accordingly, courts applying the limitations provision under Section 922 have generally construed any writing which evinces an intention to seek further compensation as a proper request for modification under the Act. See, e.g., Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545 (5th Cir. 1974); Candado Stevedoring Corp. v. Willard, 185 F.2d 232 (2d Cir. 1950); see also Employers Liability Assurance Corp. v. Donovan, 279 F.2d 76 (5th Cir.), cert. denied, 364 U.S. 884, 5 L.Ed.2d 105 (1960) (applying this standard to filings of original claims under Section 919 of the Act and the limitations delineated in Section 913 of the Act).

Most notably, the U.S. Court of Appeals for the Fifth Circuit, in Fireman's Fund Ins.

Co. v. Bergeron, held that a modification request was timely filed where the writing at issue was a memorandum transcribed by the deputy commissioner from a recorded telephone message left by the claimant's attorney. 493 F.2d at 547. That memorandum read, in pertinent part, as follows:

> Mr. Hardee claims the claimant is permanently totally disabled and will file for a review under [Section] 22 of the Act. . . .

Id. at 546. In determining that this notice was sufficient to toll the limitations period under Section 922, the court recognized that "[t]he trend of decisions appears to be that any written notice by or on behalf of the claimant within one year evidencing an intention to make a claim will be treated as sufficient to toll the running of the statutory period . . . ." Id. at 547 (emphasis omitted) (emphasis added).

In the Candado Stevedoring Corp. v. Willard case, the U.S. Court of Appeals for the Ninth Circuit had a similar opportunity to address the issue of what constitutes a proper request for modification under Section 922. 185 F.2d 232. The court in that case directly stated that the fact that the claimant at issue labeled his submission as a claim for compensation, instead of an application for

review, was immaterial. Id. at 233. Accordingly, based upon this broad interpretation of the modification filing requirement, the court affirmed the compensation order entered in favor of the claimant. Id.

Along these same lines, several cases arising under the Black Lung Benefits Act, 30 U.S.C. Sections 901 et seq. ("BLBA"), have broadly interpreted and applied the modification provision under Section 922 of the LHWCA pursuant to the incorporation of that Section into the BLBA under 30 U.S.C. Section 932(a).[3] In Consolidation Coal Co. v.

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[3] That section provides, in pertinent part, as follows:

> Subject to section 28(h)(1) of the [LHWCA] Amendments of 1984 . . . , during any period after December 31, 1973, . . . , the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) [33 U.S.C.S. [Sections] 901 et seq.], as amended, . . . , shall (except as otherwise provided in this subsection or by regulations of the Secretary . . .), be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumonoconiosis arising out of employment in such mine, ...

30 U.S.C. Section 932(a).

Worrell, the U.S. Court of Appeals for the Sixth Circuit determined that a claimant's second claim for benefits under the BLBA was properly treated as a request for modification of a prior claim, rather than as a new claim. 27 F.3d 227 (6th Cir. 1994). In do doing, the court dismissed the employer's argument that the submission should not be treated as a proper request for modification where it

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Note that 20 C.F.R. Section 725.310, promulgated under the BLBA, mirrors the language of LHWCA Section 922 and states, in pertinent part, as follows:

> (a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.
>
> . . .
>
> (c) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing or decreasing the amount of benefits payable may be made effective on the date from which benefits were determined payable by the terms of an earlier award. . . .

failed to specifically state the grounds for the modification. Id. at 230. More definitively, the court stated:

> Neither [Section] 22 of the Longshore Act nor 20 C.F.R. [Section] 725.310 requires a claimant to plead such a ground. Once a request for modification is filed, no matter the grounds stated, if any, the deputy commissioner has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions.

Id. at 230.

Likewise, in National Mines Corp. v. Carroll, the U.S. Court of Appeals for the Third Circuit construed an employer's letter of controversion and later submission of medical evidence as sufficient to constitute a timely request for modification. 64 F.3d 135 (3d Cir. 1995). In so doing, the court stated that the Department of Labor "reasonably could infer" from the submissions that the employer sought "modification on the ground of a factual mistake regarding the existence or extent of [the claimant's] disability." Id. at 139. Further, the court noted that "[t]he DOL's assertion that the informal procedures employed in black lung and

longshore cases never have required the submission of a formal request for modification is supported by case law." Id. (citing Eifler v. O.W.C.P., 926 F.2d 663, 667 (7th Cir. 1991)).

Finally, in Eifler v. O.W.C.P., cited immediately above, the U.S. Court of Appeals for the Seventh Circuit determined that a claimant had not waived mistake of fact as a grounds for modification where he apparently failed to state that ground in his submission to the Department of Labor. Id. at 667. In holding that the petition could reasonably be read to raise the issue, the court stated:

> The petition was not artful, but formal pleadings are not required in black lung or longshoremen's cases . . . .

Id. (internal citations omitted).

What these decisions demonstrate is that courts construing the limitations provision in Section 922 of the LHWCA, including the Second, Third, Fifth, Sixth, and Seventh Circuits, have never required that the specific grounds upon which the modification is requested be stated in the modification request. Further, at least some of those cases unequivocally suggest that the modification request need not even state that a "modification" is sought, but rather must

merely indicate an intention to seek compensation.

In direct contrast to this broad interpretation of the "filing" requirement under Section 922, the U.S. Court of Appeals for the Fourth Circuit in the immediate case adopted a restrictive view of what filings are sufficient to toll the limitations provision under Section 922. Specifically, the court, while purporting to apply a "reasonableness" standard, rejected a modification request which, although not stating the grounds upon which modification was sought, clearly evinced an intent to seek further compensation benefits. In doing so, the court not only rejected a modification request which was proper under the rationale delineated in the five sister circuits which have addressed the issue, but also established a standard directed more at what action the district director takes in response to the application than the intention reasonably conveyed by the party filing the request. Simply put, the court adopted a standard that mandates the strict delineation of grounds and specifics, as opposed to the generalized intent requirement seemingly established by the other courts outlined above.

In addition, the Fourth Circuit, through its citation of the fact that the application

at issue "made no reference to any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with an earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification," 73 F.3d 523, 527 (App.A. at XI-XII), appeared to adopt such factors as the proper measure of an application's validity. Indeed, in citing the omission of such specific grounds for modification, the court determined that Petitioner had "thus failed to indicate any actual intention . . . to seek compensation for a particular loss, ..." Id. (emphasis added). This despite the specific language of the claim letters stating that a claim was being made.

In finding as it did, and in adopting a hard-line approach as to what constitutes a sufficient modification request under the Act, the Fourth Circuit interpreted and applied Section 922 of the LHWCA in a fashion which indisputably contrasts with at least five other federal judicial circuits. In light of this divergence across the circuits, the immediate case is undeniably ripe for appropriate review by this Court.

II. **The decision of the Court of Appeals in this case involves the important federal question of what constitutes a sufficient request for modification under Section 922 of the Longshore and Harbor Workers' Compensation Act, which has not been, but should be, directly addressed by this Court.**

This Court has in past years addressed issues which relate in part to the Section 922 issue presented in this case. For example, in 1968, the Court decided Banks v. Chicago Grain Trimmers Assoc., 390 U.S. 459, 20 L.Ed.2d 30, reh'g denied, 391 U.S. 229, 20 L.Ed.2d 671 (1968), in which the Court determined, in pertinent part, that a second claim challenging a determination of fact with respect to the denial of the claimant's initial claim fell within the scope and coverage of Section 922 of the LHWCA. Id. at 465, 36. In so holding, the Court noted:

> It is irrelevant for purposes of [Section] 22 that the petitioner labeled her second action a claim for compensation rather than an application for review so long as the action in fact comes within the scope of the section.

Id. (citing Candado Stevedoring Corp. v.

Willard, 185 F.2d 232).

Next, in O'Keeffe v. Aerojet Shipyards, Inc., 404 U.S. 254, 30 L.Ed.2d 424 (per curiam), reh'g denied, 404 U.S. 1053, 30 L.Ed.2d 742 (1971), the Court held that Section 922 of the LHWCA vests a deputy commissioner with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely reflection on the evidence initially submitted." Id. at 256, 426. The Court further determined that such broad discretion is in keeping with the goal of rendering "justice under the act." Id.

Most recently, in Metropolitan Stevedore Co. v. Rambo, 515 U.S. ___, 132 L.Ed.2d 226 (1995), this Court determined that the term "change in conditions" under Section 922 of the LHWCA encompasses both changes in an employee's physical condition and changes in his or her wage-earning capacity. Id. at ___, 235.

While these decisions do evince a general trend by the Court towards liberal interpretation of the Act in conformance with the mandates of the Court's decision in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268, 53 L.Ed.2d 320, 335-36 (1977), the Court has never specifically addressed what test or factors should be utilized in

determining the sufficiency of a request for modification under the LHWCA.[4] Clearly, the Banks decision lends support for the arguments delineated herein (1) that submissions under Section 922 should be liberally construed, (2) that the specific wording of the submission is not dispositive of its sufficiency, and (3) that a restrictive application of the statute frustrates the very purposes of the Act. Thus, insofar as the decision of the Fourth Circuit Court of Appeals in the immediate case runs afoul of these principles, that decision is clearly contrary to the Banks Court's binding interpretation of the LHWCA and simply cannot stand.

However, to the extent that the Banks decision does not fully dispose of the issues at bar, the disparity across the circuits with respect to this element of the Act's coverage remains unremedied to date by this Court. The inevitable result of this disparity, a disparity which is undeniably perpetuated by the Fourth Circuit's decision in the immediate case, is that neither current nor potential

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[4] Indeed, the Court has not specifically addressed what tests or factors should apply when evaluating the sufficiency of a claimant's initial claim for benefits under the Act or, further, whether the two filings should be evaluated under identical tests.

future claimants can have any meaningful understanding as to what types of documents are sufficient to trigger the protections of the Act. Clearly, in light of the remedial and humanitarian purposes of the Act, as well as the principle of uniform application embodied therein, such a lack of clarity must be remedied.[5]

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[5] This conclusion is especially pertinent in light of footnote number three of the Fourth Circuit's opinion in the immediate case. Therein, the court stated: "For the same reasons that the December 1989 letter failed to constitute a valid request for modification, it also failed to qualify as a timely filing of a claim under 33 U.S.C. [Section] 913(a)." 73 F.2d at 528 (App.A. at XIV). In making this statement, the Court of Appeals recognized that its restrictive approach to filings under the Act would apply as well to the filing of initial claims under the Act.

III. **The decision of the Court of Appeals in this case is erroneous and is likely, given the significant volume of longshoring, shipbuilding, and commercial shipping activity which occurs within the Fourth Circuit, to have broad detrimental effects which will undermine the very purposes of the Longshore Act.**

The Fourth Circuit encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Of primary note within that geographic area is the Hampton Roads region in southeastern Virginia. This area includes Newport News Shipbuilding and Dry Dock Co., one of the nation's largest shipbuilding and ship repair facilities for both private and United States Navy vessels. The facility physically covers approximately 550 acres and contains the largest dry dock in the Western Hemisphere. The Port of Greater Hampton Roads Annual 1995, at 113-14 (1995). In addition, the facility currently employs nearly 20,000 employees involved in various facets of the shipbuilding and ship repair processes. Id. at 119.

In addition to Newport News Shipbuilding, the Hampton Roads area is the location of numerous additional shipbuilding, ship repair,

longshoring, and commercial cargo enterprises. Specifically, the area serves as the location for thirteen large shipbuilding and ship repair facilities; six international marine container terminals; seven merchandise terminals; three coal terminals; one grain handling facility; and fifteen oil storage and handling facilities. Id. at 34-60.

Indeed, statistics show that, in 1993, more foreign water-borne commerce was exported through Hampton Roads than any other city on the East Coast. Id. at 5. Likewise, Hampton Roads ranked third in this category overall in the entire United States. Id. Further, in 1993, Hampton Roads handled over 53 million short tons of cargo and received over 2,500 vessel calls from vessels representing more than 80% of the world's leading shipping lines. Id. Finally, Hampton Roads is the largest coal port in the world. Id. at 124.

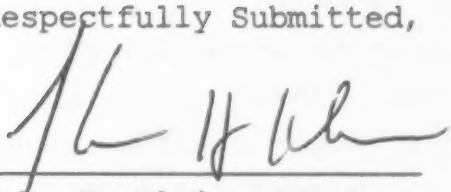
What the above facts demonstrate is that the propriety of the Court of Appeals' decision in this case is of particular importance because of the substantial maritime activity which occurs in the Fourth Circuit geographic area. Clearly, where the propriety of that decision regarding the sufficiency of the request for modification is questionable in light of the divergent approaches adopted in various other jurisdictions and seemingly

endorsed by the Supreme Court itself, the need for a proper and appropriate resolution of the issue by this Court is indisputable.

CONCLUSION

In the immediate case, the Fourth Circuit Court of Appeals delineated a restrictive approach which excluded Section 922 relief under the LHWCA for submissions which specifically made claim for benefits under the Act and required a claimant to specify in the initial request the specific relief sought and the specific grounds therefor. This approach was adopted in clear contravention of significant precedent from five other federal circuits, and from this Court itself, which, while requiring that a submission under Section 922 must evince an intention to seek compensation, mandates the liberal construction of such submissions in order to effectuate the remedial purposes of the Act. The Fourth Circuit's test is likely to significantly limit coverage under the Act in contravention of the very spirit of the Act, results which this Court should not permit to stand. This Court should exercise its authority and grant review in this case in order to correct the Fourth Circuit's divergent requirement for Section 922 modification requests.

Respectfully Submitted,



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APPENDIX A

Decision of the United States Court of Appeals for the Fourth Circuit: I.T.O. Corporation of Virginia v. Pettus, 73 F.3d 523 (4th Cir. January 16, 1996) (No. 95-1675)

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

I.T.O. CORPORATION OF VIRGINIA,
Petitioner,

v.

CHARLES PETTUS,
Respondent,

and No. 95-1675

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Intervenor.

On Petition for Review of an Order of the Benefits Review Board.
(BRB 92-999)

Argued: November 2, 1995
Decided: January 16, 1996

Before ERVIN, Chief Judge, and HALL and WILKINSON, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Ervin and Judge Hall joined.

COUNSEL

ARGUED: Gerard E. W. Voyer, TAYLOR & WALKER, Norfolk, Virginia, for Petitioner. John Harlow Klein, RUTTER & MONTAGNA, Norfolk, Virginia, for Respondent. Michael Scott Hertzig, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Intervenor. **ON BRIEF**: Donna W. Kearney, TAYLOR & WALKER, Norfolk, Virginia, for Petitioner. Thomas S. Williamson, Jr., Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C. for Intervenor.

OPINION

WILKINSON, Circuit Judge:

I.T.O. Corporation of America ("I.T.O.") appeals a decision of the Benefits Review Board ("BRB") awarding $790.62 in temporary total disability benefits to claimant. The BRB held that a claimant's letter containing a bare and unsupported demand for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA") tolled the one year limitations period on the power of the Office of Workers' Compensation Programs ("OWCP") to modify an existing compensation order. 33 U.S.C. § 922. Because we do not believe that such a letter constitutes a valid request for modification of an existing compensation order, we reverse the decision of the BRB and remand with instructions to deny the compensation claim.

I.

While working as a longshoreman for I.T.O., Charles Pettus injured his knee twice, on September 22, 1987 and on February 1, 1988. After both injuries Pettus suffered a period of temporary total disability. The injuries also caused a permanent partial disability in

Pettus' right knee. On June 1, 1988, Pettus filed claims for disability benefits under the LHWCA. 33 U.S.C. § 901 et seq.

Pettus and I.T.O. eventually resolved their differences regarding the two injuries. Pursuant to their agreement, the district director, OWCP, entered compensation orders on August 23, 1989. I.T.O. complied with these orders, making its last payment to Pettus on August 28, 1989.

About a week later, on September 6, Pettus' counsel sent letters to the OWCP referencing the previous two injury claims and stating, "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [LHWCA]." The OWCP filed these letters, but otherwise took no action with regard to Pettus' case. I.T.O. received no notice of these letters.

The next month, as a result of his injured knee, Pettus suffered an additional period of temporary total disability from October 3 to October 17, 1989. Shortly thereafter, on November 3, 1989, Pettus and I.T.O. reached an agreement regarding attorney's fees for Pettus' initial claims. During these discussions, Pettus' counsel appears to have

made no mention of the additional period of disability that had occurred in October.

On December 13, 1989, Pettus' counsel sent another letter to the OWCP referencing Pettus' two previous claims. Like the September letters, the December letter contained only one sentence. The letter stated "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]," but it did not report Pettus' period of disability during October. Again, OWCP took no other action with regard to Pettus' case, and I.T.O. was not provided with notice of the letter.

Until November 14, 1990, Pettus' case appears to have been inactive. On that date, however, Pettus obtained a "not fit for duty" slip from a Dr. Morales covering the period of temporary total disability from October 3 through October 17, 1989. On January 10, 1991, Pettus' counsel sent this slip to the OWCP along with a letter requesting a conference to discuss Pettus' temporary total disability during the October 1989 period.

On January 24, 1991, the OWCP sent I.T.O. a notice of an informal conference to discuss this claim for temporary total disability.

See 33 U.S.C. §§ 919(b)-(c). The February 6, 1991 conference, however, failed to resolve Pettus' claim. On October 8, 1991, a formal hearing was held before an ALJ pursuant to the LHWCA, 33 U.S.C. § 919(c), to address whether Pettus' "claim for temporary total disability benefits for the period from October 3 to October 17, 1989 is time-barred as per Section 22 of the [LHWCA, 33 U.S.C. § 922]." The ALJ held: (1) that Pettus' letters of September and December 1989 did not qualify as valid requests for modification under § 922; and (2) that Pettus' January 1991 request was time-barred by § 922.

Pettus subsequently appealed the ALJ's decision to the BRB. The BRB reversed the ALJ and held that Pettus' December letter constituted a valid and timely request for modification under 33 U.S.C. § 922. The company now appeals the BRB's decision to this court.[1]

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[1] Under I.T.O. v. Benefits Review Bd., 563 F.2d 646, 648 (4th Cir. 1977), the "Director, Office of Workers' Compensation Programs, Department of Labor, is not a proper respondent in a petition for review . . . although upon application and for good cause shown he may be permitted to intervene therein." Inasmuch as the Director "administers and enforces the LHWCA [and] this court defers to his interpretation unless it is

II.

We shall review at the outset the statutory procedure for modifying compensation orders under the LHWCA. Section 22 of the LHWCA, 33 U.S.C. § 922, governs attempts to modify an existing compensation order on the ground of a change in conditions or because of a mistake of fact:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [district director],[2] the [district director] may, at any time prior to one year after the date of the last payment of compensation . . . review a compensation case . . . in

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unreasonable or contrary to Congressional intent," Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 258 (4th Cir. 1991), we find that the Director has shown good cause to intervene.

[2] Though the statute still refers to the district director by his or her prior title, deputy commissioner, the title of the person performing these duties has been changed to "district director."

> accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 22. As the Supreme Court has noted, section 922 places a strict one-year limit on the power of the district director to review an existing compensation order. See Intercounty Construction Corp. v. Walter, 422 U.S. 1, 10-11 (1975).

Under § 922, the review process begins either at the district director's own initiative or "upon the application of any party in interest." An application of a party in interest need not meet formal criteria. See Fireman's Fund Insurance Co. v. Bergeron, 493 F.2d 545, 547 (5th Cir. 1974). The application need only be sufficient to trigger review before the one-year limitations period expires. See Intercounty, 422 U.S. at 11 (§ 922 imposes a "one-year time limit [] on the power of the [district director] to modify existing orders"); O'Keeffe v. Aerojet-General

Shipyards, Inc., 404 U.S. 254, 255 (1971) (§ 922 "permits a reopening within one year"); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 1232 (4th Cir. 1985) (under § 922, an "award may be modified at any time within one year after the last payment of compensation").

The application of a party in interest is only the first step of review, a process that continues "in accordance with the procedure in respect of claims in section 919." 33 U.S.C. § 922. Section 919 prescribes that "[w]ithin ten days after such claim is filed[,] the [district director] . . . shall notify the employer and any other person . . . whom the [district director] considers an interested party, that a claim has been filed." 33 U.S.C. § 919(b). After notification, the district director "shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. § 919(c).

III.

Pettus contends that his letters of September and December 1989 sufficed to trigger review under § 922:

> Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [LHWCA]. [September 1989 letter]
>
> Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]. [December 1989 letter]

Neither letter, however, induced any action on the part of the district director. Indeed, it appears that the district director did not regard either letter as an application for review under § 922. Had the district director been able to discern such an intention on the part of Pettus, the district director would have notified I.T.O., the next step in the statutory review process. See 33 U.S.C. § 919(b). I.T.O. received no such notice. Nor did the district director proceed with any investigation, conference, or hearing. See 33 U.S.C. § 919(c). Pettus' letters simply remained on file, apparently without any concern on the part of Pettus' counsel that many months later he had not heard from either the district director or I.T.O. regarding Pettus' alleged petition for review. given

the sparseness of these letters, it is hardly surprising that the process of review never began.

The Director of OWCP argues that § 922 allows threadbare letters, such as those sent by Pettus in September and December of 1989, to initiate the review process without any subsequent action on the part of the district director. We find this argument unpersuasive. Section 922's requirement that review commence within one year is not automatically fulfilled by just any communication from the claimant. A request for modification constitutes the commencement of review only if it is sufficient to initiate the process required under § 922, a process whose next step must occur within ten days of claimant's request for modification. While a claimant's application for modification need not meet any particular form, there must be some basis for a reasonable person to conclude that a modification request has been made.

Here, Pettus' letters were too sparse to meet even this most lenient of standards. They made no reference to any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with

the earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification. The letters thus failed to indicate any actual intention on the part of the claimant to seek compensation for a particular loss, a factor that is critical in assessing their sufficiency. Indeed, in Fireman's Fund, 493 F.2d at 546, the case principally relied upon by Pettus, the claimant evinced just such an intention: "[T]he claimant is permanently totally disabled and will file for a review under § 22 of the Act." Pettus' own letter by contrast -- "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]" -- does not disclose the requisite intent on the part of the writer to seek compensation for any particular loss or injury.

Indeed, it was impossible for Pettus to state such an intention in his September letter; Pettus did not suffer the additional period of disability until October. Such anticipatory filings cannot be thought of as initiating review. Further, the fact that the September 1989 letter was sent without cause also taints its twin, the December 1989 letter, which likewise appears to have been nothing more

than a protective "catch-all" filing. Pettus' counsel even failed to mention the October disability while resolving the matter of attorney's fees with I.T.O. and the district director in November of 1989. In these circumstances, the claimant was sleeping on his rights.

As a result, neither notice nor investigation occurred until after claimant's more specific letter of January 10, 1991:

> Enclosed with this letter please find photostatic copy of a "Not fit for duty" status slip covering the period 10/3/89 to 10/17/89. I would greatly appreciate it if you would please set this matter down for a conference on the issue of temporary total disability covering the above period.

Indeed, following this January letter, events moved forward: notice to I.T.O. on January 24, a conference on February 6, and a formal hearing before an ALJ on October 8, 1991.

Unfortunately, by 1991, the power granted to the district director by Congress to review Pettus' compensation order had expired.

Accordingly, Pettus and the district director, by attempting to commence review in January of 1991, ran afoul of Congress' "one-year time limit imposed on the power of the [district director] to modify existing orders." Intercounty, 422 U.S. at 11. To allow inscrutable, single-sentence letters like those of September and December 1989 to toll the limitations period would set Congress' enactment at naught.[3]

IV.

Statutes of limitation "represent a pervasive legislative judgement . . . that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" United States v. Kubrick, 444 U.S. 111, 117 (1979)[] [()]quoting Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)[)]. In deference to that legislative judgment, we must reverse the decision of the Benefits Review Board and remand with directions to deny the compensation claim.

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[3] For the same reasons that the December 1989 letter failed to constitute a valid request for modification, it also failed to qualify as a timely filing of a claim under 33 U.S.C. § 913(a).

REVERSED AND REMANDED

APPENDIX B

Decision of the Benefits Review Board, United States Department of Labor, dated June 13, 1994: Pettus v. I.T.O. Corporation of Virginia, BRB No. 92-0999 (1994).

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
BRB NO. 92-0999
NOT PUBLISHED

CHARLES PETTUS	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	JUNE 13, 1994
I.T.O. CORPORATION	)	
OF VIRGINIA	)	
Self-Insured	)	
Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Gerard E. W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.[1]

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1261, 1262) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence,

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[1] Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5)(1988).

and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. § 921(b)(3).

On September 22, 1987 and February 1, 1988, claimant sustained injuries to his right knee during the course of his employment with employer. Thereafter, claimant filed claims under the Act. On June 29, 1989, claimant and employer entered into stipulations regarding both claims. With regard to the September 22, 1987 injury, the parties agreed that claimant was entitled to temporary total disability benefits from September 23, 1987 through January 31, 1988, in the amount of $7,397.93, which employer had already paid. With regard to the February 1, 1988 injury, the parties agreed that claimant was entitled to temporary total disability benefits for the periods of March 29, 1988 through July 31, 1988, and August 1, 1988 through September 6, 1988, in the amount of $9,148.59; employer had previously paid $7,059.09. In addition, the parties agreed that claimant was entitled to permanent partial disability benefits for a 17.5 percent permanent partial disability to his left leg, to be paid in a lump sum in the amount of $19,923.62. Subsequently, on August

23, 1989, the district director[2] issued two compensation orders awarding claimant compensation based upon the parties' stipulations. Each order stated that the file will be closed "subject to the limitations of the Act or until further order of the Deputy Commissioner." Emp. Ex. 4-5. Employer made its final payments of compensation to claimant on August 28, 1989.

On September 6, 1989, claimant's counsel sent letters to the district director, referencing the prior two claims, stating in each: "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the Longshore & Harbor Workers' Compensation Act." Emp. Exs. 6-7. Copies of these letters were not sent to employer and the district director did not notify employer of the receipt of the letters. On October 3, 1989, claimant allegedly sustained another work-related knee injury and was out of work until October 17, 1989.

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[2] Pursuant to 20 C.F.R. § 702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

On December 13, 1989, claimant's counsel sent a letter to the district director, again referencing the two previous claims and stating: "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to The Longshore & Harbor Workers' Compensation Act." Emp. Ex. 13. Claimant did not send a copy of this December 1989 letter to employer and, again, the district director did not notify employer of the letter upon his receipt of it. On January 10, 1991, claimant's counsel sent a letter to the district director, enclosing a "not fit for duty" slip from Dr. Morales, dated November 14, 1990, for the period October 3, 1989 to October 17, 1989, and requesting a conference on the issue of claimant's entitlement to temporary total disability compensation for that period.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered an additional period of work-related temporary total disability from October 3 through October 17, 1989. The administrative law judge also accepted the parties' stipulation that claimant's average weekly wage at the time of all injuries was $592.96, yielding a compensation rate of $395.31 per week under

Section 10 of the Act, 33 U.S.C. § 910. However, the administrative law judge, citing Section 22 of the Act, 33 U.S.C. § 922, rejected claimant's argument that since his original claims were timely under Section 13 of the Act, 33 U.S.C. § 913, all subsequent requests for compensation are timely. The administrative law judge then found that the September 6, 1989 letters could not be considered requests for modification since they pre-dated claimant's October 3, 1989 injury. Next, the administrative law judge found that the December 13, 1989 letter did not constitute a request for modification, as it did not indicate whether further compensation on behalf of claimant was sought. Rather, the administrative law judge found the September and December letters to be bare assertions of a claim under the Act, submitted after the district director's order, with the intent to negate the one year statute of limitations period set forth in Section 22. Thus, the administrative law judge found that since no request for modification was made by August 28, 1990, and a claim was not filed within one year of the additional period of disability, claimant's claim for additional compensation was not timely. Accordingly, the administrative law judge denied claimant's request for additional compensation.

On appeal, claimant urges reversal of the administrative law judge's denial of his claim for additional benefits, contending that since his first claims were timely filed, his subsequent requests for compensation are timely and cannot be barred by Section 22. In the alternative, claimant asserts that his September 6 and December 13, 1989 letters constituted timely claims for compensation. Employer responds, urging affirmance. Section 22 of the Act, 33 U.S.C. § 922, provides the only means for changing otherwise final decisions. Modification of a prior order is permitted, at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact or where the claimant's physical or economic condition has improved or deteriorated. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *see also Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The party requesting modification based on a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

While we agree with the administrative law judge that claimant's September 6, 1989 letters cannot be considered requests for modification, as they pre-dated the October 3, 1989 incident which resulted in claimant's subsequent period of temporary total disability, we hold, on the facts of this case, that claimant's letter dated December 13, 1989, to the district director constituted a valid request for modification.[3] It is well settled that a request for modification need not be formal in nature. Rather, such a request simply must be a writing which indicates an intention to seek further compensation. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989). In the instant case, while claimant's letter of

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[3] We note that the stipulations entered into by claimant and employer are not settlements under Section 8(i) of the Act, 33 U.S.C. § 908(i) (1988), and can be subject to Section 22 modification, as they do not state that they are adequate and not procured by duress, and do not discharge the liability of employer for further compensation. *See Olsen v. General Engineering and Machine Works*, 25 BRBS 169 (1991); 33 U.S.C. § 908(i) (1988); Emp. Exs. 3a, b. Moreover, the district director's orders cannot be construed as Section 8(i) settlements as they also do not provide for the complete discharge of employer's liability for payment of compensation. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); Emp. Exs. 4-5.

December 13, 1989 does not specifically reference the October 3, 1989 incident which affected claimant's knee condition, it does reference claimant's prior claims for his previous knee injuries, and states: "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the Longshore & Harbor Workers' Compensation Act." Emp. Ex. 13. Even assuming, *arguendo*, that claimant's counsel filed this letter as a protective measure, as the administrative law judge suggests, this statement does indicate an intention on behalf of claimant to seek further compensation with regard to his knee injury, *see Madrid*, 22 BRBS at 148, and the administrative law judge accepted the parties' stipulation that claimant did in fact sustain an additional period of work-related temporary total disability from October 3, 1989 to October 17, 1989. Accordingly, as this December 1989 letter was sent subsequent to the occurrence of a second work incident which resulted in temporary total disability, and this letter indicates an intention to seek further compensation, we reverse the administrative law judge's determination that claimant's counsel's letter of December 13, 1989 did not constitute a request for modification pursuant to Section 22 of the Act. Inasmuch as the

administrative law judge accepted the parties' stipulation with regard to claimant's average weekly wage, and their stipulation that claimant suffered an additional period of work-related temporary total disability from October 3 through October 17, 1989, we additionally reverse the administrative law judge's denial of benefits and hold, based upon these accepted stipulations of the parties, that claimant is entitled to temporary total disability benefits for the aforementioned period pursuant to Section 8(b) of the Act, 33 U.S.C. § 908(b).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is reversed, and the administrative law judge's decision is modified to reflect claimant's entitlement to temporary total disability benefits for the period October 3 through October 17, 1989, at a compensation rate of $395.31 per week.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

CERTIFICATE OF SERVICE

BRB No. 92-0999: Charles A. Pettus v. I.T.O. Corporation of Virginia (Case No. 91-LHCA-1261, 91-LHCA-1262) (OWCP No. 05-0063104, 05-0064541)

I certify that this Decision and Order was sent this day to:

_____ _____

(Date) Paul E. Trayers
Clerk of the Board

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APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated January 29, 1992: Pettus v. I.T.O. Corporation of Virginia, ALJ Nos. 91-LHC-1261; 91-LHC-1262 (1992).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE NOS. 91-LHC-1261, 91-LHC-1262
OWCP NOS. 5-63104, 5-64541

In the Matter of

CHARLES A. PETTUS,
Claimant,

v.

I.T.O. CORPORATION OF VIRGINIA,
Employer.

APPEARANCES:

John H. Klein, Esq.,
For The Claimant

Gerard E. W. Voyer, Esq.,
For The Employer

BEFORE: RICHARD R. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter the "Act").

A formal hearing was held in Hampton, Virginia on October 8, 1991, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.[1]

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[1] The following abbreviations will be used as citations to the record:

EX - Employer's Exhibits
TR - Transcript of the Hearing

XXX

STIPULATIONS

The Employer and the Claimant stipulate, and I find:

1. The parties are under the jurisdiction of the Act.

2. At all relevant times, an employer/employee relationship existed.

3. Claimant's average weekly wage at the time of all injuries was $592.96, yielding a compensation rate of $395.31 per week.

4. Claimant sustained injuries to his right knee on September 22, 1987 and on February 1, 1988 while engaged in the course of his employment.

5. The parties voluntarily entered into stipulation agreements regarding Claimant's injuries, which led to two compensation orders being issued by the District Director on August 23, 1989.

6. Employer paid all compensation due the Claimant pursuant to said compensation orders, and provided the Claimant with

all necessary medical services in accordance with Section 7 of the Act.

7. Claimant suffered an additional period of work-related temporary total disability from October 3, 1989 to October 17, 1989.

ISSUE

Whether the claim for temporary total disability benefits for the period from October 3 to October 17, 1989 is time-barred as per Section 22 of the Act?

FINDINGS OF FACT

On September 22, 1987 and February 1, 1988, the Claimant sustained injuries to his right knee while performing services as a longshoreman in the course of his employment with I.T.O. Corporation of Virginia. The Claimant filed claims under the Act, but the Claimant and the Employer eventually resolved all differences regarding disability benefits and entered into stipulation agreements as to both injuries, obviating the need for a formal hearing. (EX 3a, 3b). Pursuant to the stipulation agreements, the District Director

entered compensation orders for both claims on August 23, 1989. (EX 4, 5). The Employer made timely payment of all compensation benefits as per the District Director's Orders. (EX 8, 9).

On September 6, 1989, Claimant's counsel, Charles S. Montagna, sent letters to the Office of Workers' Compensation Programs referencing the two claims which stated, "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the Longshore & Harbor Workers' Compensation Act." (EX 6, 7). Mr. Montagna did not send copies of these letters to the Employer or its counsel, nor did OWCP notify the Employer or its counsel of the receipt of these letters. (EX 6, 7, 18).

On November 3, 1989, the parties reached agreement with regard to the Claimant's attorney's fee petition filed previously. (EX 10, 11). Pursuant to that agreement, the District Director entered an Attorney Fee Order on November 27, 1989. (EX 12).

On December 13, 1989, Claimant's counsel again sent letters to OWCP referencing the two claims which stated, "Please be advised that we herewith make claim for any and all

benefits my client may be entitled to pursuant to the Longshore & Harbor Worker's Compensation Act." (EX 13). Mr. Montagna did not send copies of these letters to the Employer or its counsel, nor did OWCP notify the Employer or its counsel of the receipt of these letters. (EX 13, 18).

On January 10, 1991, Claimant's counsel sent a letter to the District Director enclosing a copy of a "Not fit for duty" slip from Dr. Morales for the period of 10/3/89 to 10/17/89, and requesting a conference on the issue of temporary total disability for that period. (EX 14, 14a). Employer refused to pay the additional period of disability, asserting that Claimant's request was not timely as per Section 22 of the Act.

DISCUSSION AND CONCLUSIONS OF LAW

Section 22 of the Act allows modification of a prior compensation order on the grounds of a change in conditions or because of a mistake of fact, provided that such request is made "at any time prior to one year after the date of the last payment of compensation." In the present case, all compensation payments were made by August 28, 1989. Therefore, any request for modification of the compensation

orders must have been made by August 28, 1990 to be considered timely.

Claimant presents two arguments. First, he contends that since his original claim was timely under Section 13 of the Act, all subsequent requests for compensation due to the same injury are timely, regardless of when they are made and whether or not a final Order has been entered by the District Director. Such an approach flies in the face of the plain language of Section 22. When a Claimant suffers an additional period of disability after an Order is entered, that is obviously a change in condition, one of the two situations for which Section 22 was designed. Claimant's theory clearly runs afoul of the laws of statutory construction and is without merit.

Claimant alternatively argues that Claimant's counsel's letters of September 6, 1989 and December 13, 1989 constitute a request for modification under Section 22. Employer counters that such letters are merely "protective letters", claim letters submitted without foundation and intended to avoid or negate the statutory limitations provisions of Section 22. To wit, Employer points out that the September 6, 1989 letters predated the

additional period of disability in October, 1989.

Unfortunately, Section 22 does not specify what constitutes a request for modification. Claimant correctly argues that the magic words "request for modification" are not necessary. Rather, the courts require "a writing which indicates an intention to seek further compensation." Fireman's Fund Insurance Co. v. Bergeron, 493 F.2d 545 (5th Cir. 1974); Banks v. Chicago Grain Trimmers Assoc., 390 U.S. 459 (1968), reh'g denied, 391 U.S. 929 (1968). Therefore, this controversy rests on whether or not Claimant's counsel's letters indicate Claimant's intention to seek further compensation for the October, 1989 disability period.

Even after liberally construing the facts in Claimant's favor as is required, I cannot consider the September 6, 1989 letters as a valid or timely request for modification. The additional period of disability occurred nearly a month after the letters were written. Since it is logically impossible to request modification for a change in condition that had not yet occurred, the September 6, 1989 letters do not qualify. The December letters came after the disability, so that hurdle is

cleared. The letters read, "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the Longshore & Harbor Worker's Compensation Act." (EX 13). Although the standard set by the courts is low, these letters do not surpass it. There is no indication of an intention to seek further compensation on behalf of the Claimant. Both the September and December letters are exactly what the Employer paints them to be, bare assertions of a claim under the Act, unsupported by any foundation, submitted by Claimant's counsel immediately after Orders are entered with the intent to avoid or negate the one-year statute of limitations of Section 22. Since Claimant made no request for modification by August 28, 1990, the claim for additional compensation is not timely. Moreover, a claim was not filed within one year of the additional period of disability.

ORDER

Accordingly, it is Ordered that Claimant's claim for compensation based on a period of disability from October 3, 1989 to October 17, 1989 is hereby denied.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ABC/ccb

Dated: Jan. 29, 1992
Hampton, Virginia

APPENDIX D

Compensation Order entered by the District Director, Fifth Compensation District, on August 23, 1989.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS DIVISION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

Charles A. Pettus
Claimant

v.

I.T.O. Corporation of Virginia
Employer

Self-Insured
Insurance Carrier

COMPENSATION ORDER
AWARD OF COMPENSATION
CASE NO. 5-64541
ACT: LHWCA

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above-entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on February 1, 1988, the claimant above named was in the employer of the employer above named at Norfolk, Virginia in the Fifth Compensation District, established under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended and extended; that the liability of the employer for compensation under the said Act was self-insured.

2. That during said time the claimant, while performing services as a longshoreman for the employer, sustained an injury to his right knee and such injury comes within the purview of the above Act.

3. That written notice of the injury was not given within thirty (30) days but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice.

4. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7 of the said Act.

5. The average weekly wage of the claimant at the time of the injury was $592.96.

6. As a result of the injury, the claimant was wholly disabled from March 29,

1988 to July 31, 1988 and from August 1, 1988 to September 6, 1988, all dates inclusive, for which he is entitled to compensation for temporary total disability for 23 and 1/7 weeks at $395.31 per week, in the amount of $9,148.59.

7. As a further result of said injury the parties have agreed that the claimant sustained a permanent partial disability equivalent to 17.5% loss of use of the right leg (knee), for which he is entitled to compensation for 50.4 weeks (17.5 percent of 288 weeks) at $395.31 per week, in the amount of $19,923.62, such amount to be paid in one lump sum as agreed to by the parties.

8. Accrued compensation for temporary total and permanent partial disability amounts to $29,072.23. The self-insured employer has paid $7,059.09 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD

1. The self-insured employer, I. T. O. Corporation of Virginia, shall pay compensation to the claimant as follows: for temporary total disability from March 29, 1988

to July 31, 1988 and August 1, 1988 to September 6, 1988, all dates inclusive, 23 and 1/7 weeks at $395.31 per week; for permanent partial disability 17.5 percent loss of the right leg, 50.4 weeks at $395.31 per week, a total of $29,072.23.

2. The self-insured employer having paid $7,059.09 to the claimant as compensation shall pay forthwith $22,013.14 whereupon the file of Charles A. Pettus will be CLOSED, subject to the limitations of the Act or until further order of the Deputy Commissioner.

3. The employer shall continue to provide medical services to the claimant in accordance with the provisions of Section 7(a) of the Act.

Given under my hand at Norfolk, Virginia this 23rd day of August 1989.

_____

B.E. Voultsides
Deputy Commissioner
Fifth Compensation District

APPENDIX E

Compensation Order entered by the District Director, Fifth Compensation District, on August 23, 1989.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS DIVISION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

Charles A. Pettus
Claimant

v.

I.T.O. Corporation of Virginia
Employer

Self-Insured
Insurance Carrier

COMPENSATION ORDER
AWARD OF COMPENSATION
CASE NO. 5-63104
ACT: LHWCA

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above-entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on September 22, 1987, the claimant above named was in the employer of the employer above named at Norfolk, Virginia in the Fifth Compensation District, established under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended and extended; that the liability of the employer for compensation under the said Act was self-insured.

2. That during said time the claimant, while performing services as a longshoreman for the employer, sustained an injury to his right knee and such injury comes within the purview of the above Act.

3. That written notice of the injury was not given within thirty (30) days but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice.

4. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7 of the said Act.

5. The average weekly wage of the claimant at the time of the injury was $592.96.

6. As a result of the injury, the claimant was wholly disabled from September

23, 1987 to January 31, 1988, all dates inclusive, for which he is entitled to compensation for 18 and 5/7 weeks at $395.31 per week, in the amount of $7,397.93.

7. Accrued compensation for temporary total disability amounts to $7,397.93. The self-insured employer has paid $7,397.93 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD

1. The self-insured employer, I.T.O. Corporation of Virginia, shall pay compensation to the claimant as follows: for temporary total disability from September 23, 1987 to January 31, 1988, all dates inclusive, 18 and 5/7 weeks at $395.31 per week, a total of $7,397.93.

2. The self-insured employer having paid $7,397.93 to the claimant as compensation shall pay forthwith $-0- whereupon the file of Charles A. Pettus will be CLOSED, subject to the limitations of the Act or until further order of the Deputy Commissioner.

3. The self-insured employer shall continue to provide medical services to the claimant in accordance with the provisions of Section 7(a) of the Act.

Given under my hand at Norfolk, Virginia
this 23rd day of August 1989.

_____

B.E. Voultsides
Deputy Commissioner
Fifth Compensation District

APPENDIX F

Mandate of the United States Court of Appeals for the Fourth Circuit filed on March 11, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

I.T.O. CORPORATION OF VIRGINIA,
Petitioner,

v.

CHARLES PETTUS,
Respondent,

and No. 95-1675

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Intervenor.

MANDATE

The judgment of this Court dated 1/16/96 takes effect today.

BERT M. MONTAGUE
CLERK